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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/052,949	01/17/2002	Carolyn Jean Cupp	112701-332	3984

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EXAMINER
HENDRICKS, KEITH D

ART UNIT	PAPER NUMBER
1761	3

DATE MAILED: 12/18/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

A8-3

Office Action Summary	Application No. 10/052,949	Applicant(s) CUPP ET AL.	
	Examiner Keith Hendricks	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____ .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) 1-28 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) 1-28 is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 2 .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1, 9, 14, 21 and 25, and thus dependent claims 3-8, 10-13, 16-20, 23-24, 26 and 28 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "reduced" (or "reducing") is a relative term which renders the claim indefinite. The term is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. It is unclear from the claims, over what original amount the brittleness of the matrix is "reduced." Note that dependent claims 3-8, 16-20, 23-24, 26 and 28 do not serve to resolve this issue, and thus are included in the rejection.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless --
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-7, 14-19, 21-23, 25 and 27-28 are rejected under 35 U.S.C. 102(b) as being anticipated by Simone et al.

Simone et al. disclose an edible pet food product comprising a matrix which comprises cellulose (insoluble) fiber, gelatinized starch and protein components (see col. 3), and a humectant such as glycerin at a concentration of about 1 to 15% (col. 5). The dried sections of this product were then subdivided into pieces which were 2.75 inch in length, 1 inch wide, and .25 inch thick, for the final product (col. 8). This product is formulated for administration to a pet animal. Thus, the claimed method is anticipated by the reference, as the claim recites measurements of "at least 6 mm". Simone et al. also teach that the cellulosic fiber materials of the pet food are used in the range of about 20-50% by weight of the final product (i.e. cellulosic materials such as corn cob, etc., not necessarily cellulose levels of 20-50%). Both wheat and

corn sources are also used as the starch. Given that wheat generally contains 2.3- 5.6% total dietary fiber, with 1.7% of that insoluble, including cellulose, and corn flour has 15% insoluble fiber, including cellulose, (pg. 481, 484. Lorenz et al. "Handbook of Cereal Science and Technology", Dekker Press, 1991), and used in the amounts provided, this would be expected to give the product a cellulose, and/or other insoluble fiber, level within the range instantly claimed. A density rating is not provided, however, given the fact that the remaining reference teachings fall within the boundaries of the instant claims, one of ordinary skill in the art would expect this to be an inherent property of the product. Simone et al. teach that the moisture content of the final product can be dried "to adjust the moisture level to about 10 to about 30% by weight" (bottom of column 5, col. 7, lines 19 and 27 as "dried" thereafter). The recitation of the phrase "in the form of a cat kibble" is given little patentable weight, especially given the further description of this phrase in the claims as simple terms of measurements.

Note that claims 25-28 do not require a protein source or a carbohydrate source.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

i) Claims 1-28 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-33 of copending Application No. 10/037,941. Although the conflicting claims are not identical, they are not patentably distinct from each other because they are each directed to pet food products and methods of using, with similar content, including protein, fiber, carbohydrate, water content and/or humectant.

ii) Claims 1-28 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-20 and 24 of copending Application No. 09/154,646. Although the conflicting claims are not identical, they are not patentably distinct from each other because they are each directed to pet food products and methods of using, with similar content, including protein, fiber, carbohydrate, water content and/or humectant.

These are provisional obviousness-type double patenting rejections because the conflicting claims have not in fact been patented.

Conclusion

The Double Patenting rejection not withstanding:

- Claim 9 would be allowable if rewritten or amended to overcome the rejection(s) under 35 U.S.C. 112, second paragraph, set forth in this Office action. It is suggested that the phrase "in an amount sufficient for reducing brittleness of the matrix" be deleted from claim 9, as a specific humectant percentage is already provided therein.
- Claims 8, 10-13, 20, 24 and 26 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, second paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (703) 308-2959. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703) 308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9565 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

KEITH HENDRICKS
PRIMARY EXAMINER